No. 21307

In the

United States Court of Appeals

FOR THE NINTH CIRCUIT

FLUOR CORPORATION, LTD., et al, UNION TANK CAR COMPANY WARD INDUSTRIES CORPORATION, now known as DRAGOR SHIPPING CORPORATION, *Appellants, Cross Appellees,* *v.* U.S.A., EX REL MOSHER STEEL COMPANY, *Appellee, Cross Appellant.*	No. 21307 No. 21307A No. 21307B No. 21307C

BRIEF OF APPELLEE MOSHER STEEL COMPANY RESPONDING TO APPELLANT WARD INDUSTRIES CORPORATION

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JURISDICTIONAL STATEMENT

The jurisdiction of the court below with respect to Mosher's claim for relief against Ward was based on diversity of citizenship, the amount in controversy exceeding $10,000 (28 U.S.C. 1332). Mosher is a Texas corporation having its principal place of business in the State of Texas (R. 268, 1220). Ward Industries Corporation, now known as Dragor Shipping Corporation, is a corporation organized and exist-

ing under the laws of the State of Delaware, having its principal place of business in the State of New York (R. 1221).[1]

Jurisdiction of this court is invoked by Appellant pursuant to 28 U.S.C. sections 1291 and 2107, and Rule 73 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Appellant Ward in its Statement of the Case adopts a similar approach to that which Union adopted in its brief in presenting its own version of the facts, some of which were disputed, admittedly. In so doing, Ward largely ignores the findings which the Court has made in resolving the disputed facts, and, in effect, from partial quotations from the Reporter's Transcript, attempts to present its case on the facts from the dead record as if the trial, and the Trial Court's findings, had never occurred.

This Court will note, however, that in Ward's Statement of the Case, it is stated that Mosher fabricated and furnished materials *to Union* and performed *for Union;* whereas, of course, in Union's brief, Mosher is said to have fabricated and furnished materials *for Ward* and performed *for Ward.* As a result of this linguistic exercise, Appellee's brief could be entirely consumed in pointing out the errors in Ward's statement, but Appellee will attempt to restrict itself to things which appear to be of consequence.

For example, on page 3 of Ward's brief, the statement is made that the judgment granted against Ward results solely from the claim that Ward "became an additional obligor" for the amount of Union's indebtedness to Mosher.

[1] The following terminology and abbreviations as used in the trial court are employed in this brief: Union and Graver are one and the same; Joint Venture is the same as IMI-Ward; "R"—Record on Appeal; "RT"—Reporter's Transcript; "Jt."—a stipulated joint exhibit; "Pl."—exhibits introduced in evidence by Mosher; Ward and Union exhibits, respectively, identified by Ward and Union.

In this statement Ward ignores Count III of the Amended Complaint (R. 269, et seq.). On pages 4 and 5 of Ward's brief, it is stated that "Union, and Union *alone*—employed Mosher—." While this statement may be correct as to the October 13 meeting between Mitchell, Burton, and Wilson, and the October 16 letter from Mitchell to Wilson (Pl. 1), the interim purchase order between Mosher and Union, it completely ignores and is certainly false with respect to the contractual arrangements which occurred subsequently wherein the Joint Venture purchase orders (Jt. 9 and 10) were issued in lieu of a formal Graver purchase order and all of the facts surrounding that transaction. The accusation is even made on page 9 of Ward's brief that Mosher's officers ignored their oaths. Suffice it to say, the Trial Judge believed Mosher's officers after days of testimony upon the stand and numerous pre-existing depositions, to say nothing of the testimony of all the other witnesses which substantiated the testimony of Mosher's officers. Testimony relating to Ward will be recited later in this brief in answer to Ward's Point I. The accusations that the Trial Court indulged in "pseudo syllogisms" exists only in the mind of the brief writer, ignore the Trial Court's Findings of Fact, and distort a rather simple and clearly understandable business relationship in an effort to avoid the obvious conclusions based upon that relationship.

As we pointed out in our Response to Union's brief, the simple facts of this transaction are as follows:

In the beginning, Union had a subcontract with Fluor for the Tucson job, and Matich Bros. and M. M. Sundt Construction Corporation for the Vandenberg job, a part of which Union in turn subcontracted to a Joint Venture composed of Idaho-Maryland Industries, Inc. and Ward Industries Corporation.

It became apparent that the Joint Venture could not perform its part of the work within the time allotted, and

Union, therefore, insisted that parts of the work be sent to others.

As a result of this, Sam Wilson negotiated on Union's behalf a contract with Mosher for the work to be performed at Tucson, and Mosher and Graver, through Wilson, Lancaster (Union's Vice President in charge of Tucson), and Harle (Union's Director of Purchases), entered into an agreement for the performance of the Tucson work, for the simple reason that Mosher would not accept the credit of the Joint Venture. This agreement began at the meeting on October 13, 1961, and is embodied in Pl. 1, the interim purchase order dated October 16, 1961, and agreements reached in Denver on October 23, 1961 between Mosher's representatives and Union's representatives. Mosher commenced performance pursuant to this interim purchase order and the promise that a formal Graver purchase order would be forthcoming.

It must be remembered that the Mosher work embodied in the October 16 letter was a part of the work *already contracted* by Union to the Joint Venture, and when George Morton, manager of the Joint Venture, received a copy of the October 16 letter, noted the prices which Mosher had quoted to Graver, and recognized that Mosher's prices were less than those which the Joint Venture had charged Union (Findings of Fact No. 42, R. 1233 and 1234), Morton did not want Mosher to deal directly with Graver, and sent his representatives to ask that Mosher accept Joint Venture purchase orders, not only for the Tucson work but also for a small amount of additional work in connection with the Vandenberg job. The Joint Venture's representatives informed Mosher that, because of the contract between Union and the Joint Venture, the supervision, accounting and billing would be better served if Mosher would accept the Joint Venture purchase orders in lieu of the formal Graver purchase order.

Mosher agreed to accommodate the wishes of the Joint Venture in this regard, but only if Union would be responsible for payment, since the credit of the Joint Venture was still unacceptable to Mosher.

After a final attempt by Morton to persuade Mosher to accept the credit of the Joint Venture, and after having been turned down again, the Joint Venture and Union agreed that Mosher would accept the Joint Venture purchase orders, fabricate and deliver the materials thereunder, bill the Joint Venture, and that after the Joint Venture had received the materials and approved the invoices, the invoices would then be paid direct by Union to Mosher, and the payments deducted from the contract price between Union and the Joint Venture. It was not contemplated that the Joint Venture would bill Union for the Mosher work, but rather that the Mosher invoices would be paid direct and deducted from the contract price.

This agreement between the Joint Venture and Union was, in turn, made with Mosher, and Mosher's requirements as to payment having been satisfied thereby, Mosher proceeded to perform, and did fully perform all of the work embodied in the Joint Venture purchase orders, and billed the Joint Venture. Then, pursuant to such agreement, of course, the promised formal Graver purchase order was no longer a part of the transaction.

The testimony and evidence surrounding Union's portion of these agreements is fully set forth in Appellee's Response to Union's brief. With respect to Ward, the performance by Mosher and its willingness to accept and perform for the Joint Venture the work embodied in the Joint Venture purchase orders, for the benefit of the Joint Venture and at its request, certainly constituted an adequate consideration upon which to predicate an agreement between Mosher and the Joint Venture, for the performance of which the

Joint Venture is indebted to Mosher. This is true, notwithstanding, as the Court has found, that Union, for its own reasons, in its own interest, and for considerations important to it, also is obligated to Mosher for the payment for the work.

It is axiomatic that two persons may each be separately obligated to a single person for the same performance, and that a single person may be obligated to two persons for the same performance. By ignoring this simple fact situation and the law applicable to it, Ward, having obtained the benefits which it desired and received from Mosher, seeks to avoid liability, primarily on the ground that Union was responsible for payment under the facts outlined above.

At the same time, in this suit by Mosher, neither Union nor Ward has seen fit to clarify their own relationships, inter se, for the obvious reason that they have settled their disputes as between themselves and agreed not to sue each other, and any testimony relating to their own relationships would doubtless have supported Plaintiff's case, and yet, the lack of testimony in the record relating to what the rights of Union and Ward were, or are, as against one another, is relied upon by both Union and Ward to cloud the issue of Mosher's rights. For example, so-called accounting testimony introduced by Union in an effort, which was not fruitful, to show that Union had overpaid the Joint Venture at the time of the IMI Chapter XI proceeding, was specifically offered by Union *only as to Mosher.*

The Trial Court's Findings of Fact with relation to the Ward obligation will not be quoted here, but the Court is respectfully referred to Findings of Fact No. 14 (R. 1224, 1225), No. 29 (R. 1228, 1229), No. 30 (R. 1229, 1230), No. 32 (R. 1230), No. 33 (R. 1230 and 1231), No. 34 (R. 1231), No. 39 (R. 1232 and 1233), No. 42 (R. 1233, 1234), No. 43 (R. 1234), No. 44 (R. 1234, 1235), No. 45 (R. 1235), No. 46 (R. 1235), and Conclusion of Law 4 (R. 1238 and 1239).

ARGUMENT

RESPONSE TO POINT I

The Court was correct in holding that a contract had been entered into between Mosher and IMI-Ward, that Mosher had fully performed the same, and that Ward was obligated to pay Mosher for that performance.

In its argument under its Point I, and in its Statement of the Case, Ward takes the same positions on the facts as it took in the trial court and in its motions for judgment, which positions were not regarded by the Trial Court as being correct, which were rejected by the Trial Court, and the contrary of which has now found its way into the Trial Court's Findings of Fact.

Ward has, nevertheless, in its Statement of the Case, recited and argued the effect of certain testimony and evidence, attempting to show that Mosher did not deal with IMI, Ward, or IMI-Ward Joint Venture, but that if Mosher dealt with any of these entities, it dealt solely with IMI, not as a member of the IMI-Ward Joint Venture, but in some way separately and apart from the Joint Venture. Ward further states that Mosher relied on the credit of Union and refused to accept the credit of IMI-Ward. In view of the above, it is believed appropriate to recite passages from the testimony and evidence which fully substantiate the Court's findings with respect to the fact that Mosher did in fact enter into an agreement with the IMI-Ward Joint Venture and that it did so with the Joint Venture, and not with IMI in some other capacity (Finding of Fact No. 43, R. 1234). This testimony and evidence is as follows, from the record:

On October 31, 1961, Wallace Orr, who was "Director of Contracts for the IMI-Ward Joint Venture" (R.T.

786), and William Holmes, Manager of Construction for the IMI-Ward Joint Venture (R.T. 791), came to Houston to see Mr. Burton, Vice President of Mosher Steel. Their coming was unannounced, insofar as Mosher was concerned. (R.T. 261).

Prior to their coming to Houston, Mr. Morton, Manager of the Joint Venture, had given Orr a copy of the October 16 letter (Pl. 1) (Union's QQQQ), and Morton told him to go to Houston to "negotiate a contract or a subcontract between the Joint Venture and Mosher for the protection of both parties." (R.T. 791). This date, of course, was subsequent to the October 13 meeting in Dallas between Wilson and the plaintiff, and subsequent to the October 16 letter. In Houston, Holmes and Orr met with Burton and then came to Dallas to talk with Mitchell. At that time, Orr pointed out that he was negotiating for and representing the Joint Venture of Idaho-Maryland Industries, Inc. and Ward Industries Corporation. (R.T. 795.)

Orr was not entirely sure whether Mr. Moore or some other representative of the Financial Department of Mosher had met with him and Holmes in Dallas. Moore did however testify that he had been called from Dallas by Burton while he (Moore) was in Houston, asking whether Moore would accept the credit (R.T. 354) of IMI-Ward for the reason that *Holmes and Orr had requested that Mosher change the order from Graver to IMI-Ward "as it would be more convenient for accounting purposes."* (R.T. 353.) Moore told Burton that he would accept a purchase order from IMI-Ward "providing that Graver would be responsible for payment" (R.T. 354).

Burton testified that Holmes and Orr arrived in Houston unannounced (R.T. 261) and asked how

Mosher was getting along with the Tucson job and asked if Mosher could fabricate a $20,000.00 addition for Vandenberg (R.T. 809). Burton told them he would try to interweave the Vandenberg job in with the Tucson job (R.T. 261). When Holmes and Orr asked about the price for the Vandenberg job, Burton suggested that they accompany him to Dallas to talk with Mitchell, in whose department matters of price would come (R.T. 262). They came to Dallas and met with Mitchell.

During the course of that meeting, Holmes and Orr raised the question about changing the customer from Graver to IMI-Ward. Holmes and Orr told Burton and Mitchell that they wanted Mosher to deal with IMI-Ward because:

> "* * * it would be much easier and simpler for them, from the accounting standpoint, to have us accept an IMI-Ward purchase order." (R.T. 264.)

Mr. Burton, from Dallas, then called Mr. Moore in Houston asking whether Moore would accept an IMI-Ward purchase order, and Moore told Burton he would accept such a purchase order:

> "* * * as long as Graver would be responsible for payment." (R.T. 264.)

Burton then informed Holmes and Orr of what Moore had said relative to accepting the IMI-Ward purchase order and the Graver responsibility for payment. (R.T. 265.)

Mitchell confirms the fact that Holmes and Orr advised him that the formal purchase order from Graver would foul up the Joint Venture bookkeeping (R.T. 85) and that it would complicate the bookkeeping, and they asked whether Mosher would accept a purchase order from the Joint Venture in lieu of the formal Graver purchase order (R.T. 85).

Mr. Mitchell identified plaintiff's Exhibit 32 as being notes which he had made on October 31 during the meeting with Holmes and Orr, that he asked them the customer's name and it was given as Idaho-Maryland Industries, Inc., and Ward Industries Corp. (R.T. 88), and that they told him that they represented the Joint Venture of Idaho-Maryland Industries, Inc. and Ward Industries Corp., and asked acceptance of a Joint Venture purchase order (R.T. 89).

Mitchell also confirms that he told Holmes and Orr that the acceptance of the changed purchase order on Tucson and the acceptance of an order for Vandenberg was dependent upon credit approval by Mr. Moore, and that Burton called Moore in Houston and heard Burton advise Holmes and Orr that Mosher would not accept a Joint Venture purchase order unless Graver assured Mosher of payment of all invoices (R.T. 90). Holmes and Orr then informed Mitchell and Burton that they (Holmes and Orr) would check into the matter and let Mosher know (R.T. 90).

Mitchell did not enter any change in the shop order for Tucson, nor did he enter any shop order for Vandenberg at that time (R.T. 90-91). The Tucson shop order was changed and the Vandenberg shop order entered on November 16, 1961. (R.T. 92-93.)

On November 13, Orr called Mitchell and again requested that Mitchell accept the Joint Venture purchase order and Mitchell again stated to Orr that they would have to be cleared with Mr. Moore of the Credit Department who was then in Lubbock (R.T. 91).

The purchase orders (Jt. 9 and 10) were received by Mitchell in Dallas on November 10, 1961 (R.T. 96), and were retained on his desk until the credit was approved on November 16, at which time he forwarded the pur-

chase orders to Houston where they were received on November 17. (R.T. 440.)

Orr testified that Morton had given him a copy of the October 16 letter (Union QQQQ) (Pl. 1) and had stated that the Joint Venture had no contract with Mosher to protect the Joint Venture, and that the *Joint Venture had to get it on contract* (Tr. 803). Orr testified that he had read the October 16 letter at the time he received it before going to Houston (Tr. 803).

Orr testified that he saw someone from the Finance Group in Dallas at the time of the negotiations (Tr. 805). Orr conceded that the terms of the October 16 letter were embodied in the purchase orders, and that the only addition in the negotiations was a $20,000.00 addition at Vandenberg, and this on the same prices as had been quoted on the Tucson job to Wilson (Tr. 809).

Mr. Orr recalls no conversations on October 13 with either Mr. Mitchell or Mr. Moore. Mr. Orr testified that he left Dallas with the belief that Mosher would accept the purchase orders from the Joint Venture, and that he so informed Vernon John on November 2, and his testimony reveals no knowledge of the transaction after that time.

Mr. Orr testfied that the purchase order form in the name of IMI only was the only form which the Joint Venture had at the time (Tr. 825).

Mr. Orr identified the purchase requisitions between the Joint Venture and Denver Steel & Iron as being a work order and:

> "* * * nothing more than an internal order giving portions of the work to Iteeco and to Denver Steel & Iron on the work that they were to do in their plants. * * *" (Tr. 848-849.)

He also testified that the purchase requisitions were given to the Government only for the purpose that the Government have information on where to assign Government inspectors. (Tr. 851.)

Orr testified that later on the Joint Venture got a stamp which said "Joint Venture" but at the time when the purchase orders were issued they used the IMI forms for the Joint Venture (Tr. 856), and that he had told the Mosher people in Dallas that he would send a Joint Venture purchase order and had sent the purchase orders (Jt. 9 and 10) pursuant to that understanding. He also testified that the purchase requisitions and the notification to the Government of the various plants involved did not determine the legal relationships of the parties (Tr. 858).

Orr identified Frank J. Wright, who signed the purchase orders, as being "purchasing man from the Joint Venture" (Tr. 863).

George Morton, the President of IMI, was the Manager of the Joint Venture (Jt. 7) (Morton 2, p. 10, Pl. Ex. 40). Vernon John was a member of the Joint Venture Committee (Jt. 7) (Morton 2, p. 11, Pl. 40). Morton described the purchase requisitions as being an internal matter, and said he had arrived at the price as a target under which the various division managers were to operate and was not a price as between IMI-Ward Joint Venture and the Divisions of IMI (Morton 2, page 42, supra).

Niels Gammeltoft, *President of Ward*, testified that the work done by IMI on the Tucson and Vandenberg jobs was done *pursuant to the Joint Venture agreement itself*, and that there was no other or further contract between the Joint Venture and IMI (Gammeltoft Dep., p. 136-139, Union CCC(1) and CCC(2)).

Morton also identified Orr as being Director of Contracts for the Joint Venture and Wright as Purchaser for the Joint Venture (Morton 2, page 12), and identified Holmes as working for the Joint Venture, together with Vernon John, who was in charge of the fiscal operation of the Joint Venture (Morton 2, p. 13, supra).

George Morton, Manager of the Joint Venture, testified that he saw the Vernon John letter (Jt. 26), shortly after it was written (Morton 2, p. 52, supra), and that it constituted a modification of the Joint Venture contract with Union.

George Morton testified that the Vernon John letter authorizing Graver to pay Mosher and to deduct from the Joint Venture contract price contained his understanding of the then situation and of what was to be done (Morton 2, p. 29-30, supra). George Morton, Manager of the Joint Venture, testified that Holmes and Orr went to see Mosher with his acquiescence (Morton 1, p. 26, Pl. 39) and that it was brought to his attention that Mosher was requiring a guarantee of the purchase order and that these arrangements had to be made before they would accept the purchase order (Morton 1, p. 27, Pl. 39).

As a result of the above testimony and evidence, Ward's complaint against the Court's Findings of Fact has been restricted to the allegation that statements made by Moore, Mitchell, and Burton on the stand to the effect that Holmes and Orr represented themselves as representing a Joint Venture composed of Idaho-Maryland Industries, Inc. and Ward Industries Corporation was a contrivance, that the purchase orders were on a IMI form and that Mosher's shop orders and billings, which were predicated upon those purchase orders, used the words "Idaho-Maryland Industries" rather than Idaho-Maryland Industries—Ward Industries Corporation Joint Venture, and that Mosher's Treasurer

never relied on the credit of the Joint Venture but, on the contrary, relied on the credit of Union and expected payment direct from Union.

At the trial, *all* of the witnesses, including Orr, testified that Holmes and Orr did represent the Joint Venture at the October 31 meeting, *did so inform* Mosher at that meeting, and that the purchase orders which followed were *intended by Orr* to be Joint Venture Purchase Orders and were *understood by Mosher* to be Joint Venture Purchase Orders. All of the persons with whom Mosher dealt, to-wit, *Holmes, Orr, Wright and Morton,* were representatives of the Joint Venture, assigned thereto by George Morton, who was himself the Manager of the Joint Venture. (Jt. 7.)

Ward was content to offer evidence consisting of "purchase requisitions," and letters to the Corps of Engineers which identified the shops in which the work was being done, to support the proposition that there was a *subcontract* between the *Joint Venture* and *one of its members,* IMI, so that IMI could be considered as having acted *independently* of the Joint Venture. This effort was to *no avail* because both the Joint Venture Manager, Mr. Morton, and the *President of Ward, Mr. Gammeltoft,* testified that there was *no such subcontract.*

IMI acted solely for and on behalf of the Joint Venture, and this fact was contemplated and relied upon by all parties. This is clearly shown by all of the testimony relative to the offer and acceptance of the purchase orders themselves and the testimony surrounding them.

Included within the testimony and documents in evidence relating to the Joint Venture, are several letters received by Mosher which bear Joint Venture identity, *the purchase orders themselves (Jt. 9 and 10) refer to the Joint Venture in several places, and the notation made by Mr. Mitchell on*

October 31 identifying the Joint Venture (Pl. 32) was actually part of the *res gestae.*

Ward's attack on the conclusiveness of the above mentioned testimony and evidence is restricted to reciting certain *small parts* of the depositions of Moore, Burton and Mitchell in which the word "IMI" without the additional use of the word "Ward" was used by the witnesses. Many of these references, as might be expected, are found in the *questions* rather than in the *answers*, and where the witness *was not aware from the question that he was being called upon to distinguish between "IMI" and "IMI-Ward."* An effort is made to quote *one sentence* of an Affidavit (Ward Exhibit F) in which "Idaho-Maryland Industries Inc." appears, without adding *another part* of the Affidavit in which the Joint Venture is mentioned. The Miller Act letter to Fluor (Pl. 24) dated March 19, 1962, long before any depositions were taken, claims a contract with the Joint Venture.

Thus, it is falsely sought to give the impression that use of word "Ward" was unknown to the Plaintiff and did not appear in the record prior to trial. In introducing *other parts* of the depositions of Mosher's witnesses, to prove *other* contentions, Union and Ward introduced testimony *taken upon deposition* which dispells the impression of afterthought sought to be conveyed, as follows:

> Moore *Deposition*, page 16 (Union UUUU), which refers to the October 31 meeting:
>
> "Q. What did you tell them?
>
> "A. I told Burton that we would not substitute *IMI-Ward* for the Graver contract without assurance from Graver—"
>
> and at page 17:
>
> "Q. And what was that previous information?
>
> "A. I had been informed right from the very beginning that those they were dealing with stated that the credit was no good for *IMI-Ward Venture.*"

When the question was put in such a way that the witness could fairly understand that the question was *whether* it was the *Joint Venture or IMI alone* which was involved, the witness *on deposition* answered very clearly, as follows:

> "Q. Well, did you understand the request Mr. Burton made as being a request for you to take this joint venture, IMI-Ward, as the customer?
>
> "A. Yes.
>
> "Q. Not just IMI alone?
>
> "A. *I understood it was a joint venture.*
>
> "Q. Were you ever at any time under the impression that you were dealing with IMI as the subcontractor for the joint venture?
>
> "A. *I was never under that impression, no.*"
> (Moore Deposition, pages 15-16)

In the short excerpts from the depositions cited by the Defendant Ward, in which the "Ward" was left off as an attachment to "IMI" where the question was not directed to *distinguishing* between "IMI" and "IMI-Ward", the witness sometimes used "IMI" in the same way in which one might say "Boyle, Bilby" in referring to the firm of Boyle, Bilby, Thompson and Shoenhair. Wherever the witness on deposition was asked *to distinguish* between the *partner* and the *firm* on the subject of the entity with whom Mosher dealt, the answer was clearly the *firm*, to-wit, *IMI-Ward.*

With respect to Ward's second contention that the fact that the purchase orders were on a printed form of IMI's rather than IMI-Ward, and that Mosher's Shop Orders and invoices mentioned Idaho-Maryland Industries and not Ward, all that can be said is that these matters are the sole and only evidence in the record which seems, on its face, to conflict with all the testimony. The fact that the pur-

chase orders were an IMI printed form certainly *accounts for the fact* that the matter was entered under *that name* in the Shop Order and, *therefore*, on the *invoices*. The Joint Venture, of course, had the *same address* in California as did Idaho-Maryland Industries, Inc.

Mr. Orr testified that the IMI printed forms were used because no Joint Venture printed forms were available.

This is doubtless true. In addition, the truth is, the various persons involved who were employees of IMI, and also assigned to the Joint Venture, clearly considered, that insofar as the Joint Venture work was concerned, Idaho-Maryland Industries, Inc. and the Joint Venture were one and the same. It is not surprising that Mosher would have been unaware of any distinction after the meeting of October 31, merely because the printed purchase orders were on the IMI form, *especially* where the *Joint Venture* was *specifically mentioned* several times in the *purchase orders*. (Jt. 9 and 10.)

Why did the IMI-Joint Venture personnel fail to distinguish? Because IMI, in the performance of the missile base projects, was acting at all times for, on behalf of, and *as* the Joint Venture under the Joint Venture Agreement.

Ward's final contention that Mosher refused to, and did not, *rely on the credit* of the Joint Venture or *expect to be paid by it*, is absolutely true from the record, but this does not mean that Mosher did not regard itself as being *obligated to the Joint Venture* to perform the work embodied in the Joint Venture Purchase Orders *nor* that Mosher had agreed to *release* the Joint Venture from its obligation to pay for the work which it had ordered done, nor that Mosher relied only on the credit of Union.

It is absolutely clear that the credit of the Joint Venture alone was not acceptable to Mosher and it was for this reason that Mosher refused to accept the purchase orders

of the Joint Venture unless Graver would be obligated to Mosher for payment. Having turned down the credit of the Joint Venture alone, and having obtained *Graver's promise to pay direct*, with the understanding that the *Joint Venture had agreed that Graver would pay direct*, it is quite obvious that Mosher *expected* payment from Union. This is *not* to say thereby Mosher had forfeited or intended to forfeit the obligation of the Joint Venture to pay Mosher for the work done by Mosher pursuant to the Joint Venture Purchase Orders.

Though *the Treasurer of Mosher relied upon Graver* for *payment*, Mosher *did actually perform the services required by the Joint Venture Purchase Orders*. That the Treasurer of Mosher, under the credit circumstances and the agreements which he had made and had been made for Mosher's benefit, did not *expect* payment from the Joint Venture because he *expected* it direct from Union can under no circumstances lead to the conclusion that there was no contract between Mosher and the Joint Venture under the Joint Venture Purchase Orders, or that the Joint Venture is not liable for payment thereunder.

In this case, we not only have a contract between Mosher and the Joint Venture, but we have *no* Mosher agreement to look *solely* to Union for payment. An agreement that Union would pay Mosher and the expectation of Mosher's Treasurer that payment would be made by Union does not constitute an agreement by Mosher that the Joint Venture owed it no contractual duty, regardless of what rights and duties may have resulted as between the Joint Venture and Graver.

There is nothing whatever in the record to indicate intent upon Mosher's part that the Joint Venture would not be liable for payment for the work done under the Joint Venture Purchase Orders. Nor is there anything in the record

indicating any understanding on the part of the Joint Venture that it was not to be liable to Mosher for the payment of Mosher's work. In fact, when Frank Wright, the Joint Venture's Director of Purchases, discovered, belatedly, on January 5, 1962, that Union would not pay Mosher invoices direct, and that they should be processed through the Joint Venture's Accounts Payable Department, he proceeded to turn the invoices over to the Joint Venture's Accounts Payable Department and asked Harle's permission to put the Mosher work "on a JV requisition to Graver to insure prompt payment." (See memorandum from Frank Wright to Tom Harle dated January 5, 1962, Pl. 28, Union P.)

In citing cases to the Court under its Point I, Ward seems to take the position that the fact that Mosher demanded and received credit of Union constitutes in some way an agreement by Mosher with Ward that Ward would not be liable, but only Union. As stated above, there is no testimony or evidence, or any inference which can be drawn therefrom, which substantiates Ward's position.

For this reason, the cases recited at length in Ward's brief, even in the statement of them presented by Ward, are not in point.

In the first case, *Colorado National Bank of Denver v. Boehm*, where a promissory note to a mother had been executed by Boehm and also by the mother's son, Joseph, the Court found that Boehm's "—signature on the note was given solely in exchange for her promise that he would not be held liable on the note; hence there was no consideration which could make this note enforceable against appellee." (Ward's brief, p. 56.) That is a pretty clear case of inability to enforce a promise where the sole consideration for the promise was that it would not be enforced, but it is certainly not pertinent to the case at hand.

Next, Ward cites statements of general principle in the *Wickham* case and the *Powers* case, that a mere fortuitous or accidental result from an agreement is not esteemed a legal consideration. (Ward's brief, p. 56.) Ward then cites *Dougherty v. Salt*, in which the Court held that a promissory note delivered by an aunt to an eight year old nephew was intended to be, and was, "a bounty." (Ward's brief, p. 58.)

Finally, under Point I Ward cites by the Supreme Court of Massachusetts a quotation from *La Chance et al v. Rigoli et al*, 91 N.E. 2d 204 (1950), the ringing statement that

> "The contracting party must look for payment to the one to whom credit was extended when the work was done, that is, the one who was expected to pay—"

A glance at the case itself reveals that the plaintiffs had entered into a written contract with a tenant to construct a building on land owned by the Cyr Oil Company. While the Cyr Oil Company assented to the erection of the buildings on its land, it had no contractual contact with the plaintiffs at all, and

> "The builders (plaintiffs) were never given to understand from or by the owner or its agents that said owner was to be held accountable or liable for any charge or charges for the erection of said filling station." At page 205.

The Court went on to hold

> "There is no legal presumption arising from ownership that the owner of the fee is liable for repairs on his buildings—"

Under the circumstances, the extracted quote from the case is certainly logical, and doubtless correct, but certainly is not authority for Ward's position in this case.

Ward seems to take the position that just because Mosher required and received an obligation by Union in view of Mosher's unwillingness to accept the credit of the Joint

Venture alone, this constitutes, as a matter of law, a release of the Joint Venture's obligation, otherwise wholly obvious, to pay for the work which it had ordered from Mosher in its purchase orders. There is no testimony or evidence to support any agreement by Mosher in this connection, so Ward takes the position that, as a matter of law, the release of Ward necessarily follows as a result of the obligation of Union.

This, of course, is not the law in any jurisdiction.

In Illinois, a case very similar on the facts to the case at hand is *Granite City Lime and Cement Company v. The Board of Education of School District No. 126 et al.*, 203 Ill. App. 134.

In that case one Beale (prime contractor) entered into a contract with the Board of Education of School District No. 126 (owner) for the erection and completion of a high school building. Thereafter, Beale entered into a subcontract with Mettlen to furnish building material and brick work for an expressed consideration. Thereafter, Mettlen placed an order with the plaintiff for the necessary brick and other building material. After Mettlen had placed the order, and before any material had been delivered, plaintiffs learned that Beale and Mettlen had agreed that Beale would pay for the materials furnished and the Chancellor found that Beale agreed, before the material was delivered, to pay for it, and that the material was furnished upon the strength of the promises of Beale. Despite the facts that *plaintiffs delivered the materials to Mettlen* and *recognized Mettlen as subcontractor* and *charged the goods to Mettlen upon their books*, nevertheless, the promise of Beale was held to be an original undertaking, and Beale was liable upon such promise.

It is interesting to note that the plaintiffs sued the Board of Education, Beale, and Mettlen. A judgment was granted against all the defendants and Beale appealed. It was also

contended by Beale that, the materials having been furnished to a *subcontractor* under the mechanic's liens statute, the plaintiffs had no right to a lien upon the building. The court found that the mechanic's lien was properly available to the plaintiff under the circumstances. The court said:

> "* * * It does appear from the evidence in this case that after the contract was made between Beale and Mettlen & Company and after Beale had promised that he would pay for the materials furnished, that Mettlen & Company did give orders to appellees (plaintiffs) upon which they received payment, and that when appellees gave their first notice they referred to Mettlen & Company as subcontractors and did other things by which they recognized Mettlen & Company as subcontractors, *but if they had a contract with appellant that he was to pay for the materials furnished, the mere fact of their having recognized Mettlen & Company as subcontractors afterwards and that the goods were charged to Mettlen & Company upon the books of appellee would not necessarily deprive them of their rights under the promise of Beale to pay for the materials.*
>
> * * * * *
>
> "After a careful consideration of all of the evidence, facts and circumstances in this case, we are of the opinion that the Circuit Court was warranted in finding that under the agreement and conduct of the appellant (Beale) that *there was an implied request upon his part to furnish the building material that was furnished* and used in the construction of the building, and that the appellee and the said McEwing & Thomas Clay Products Company are entitled to their lien under this statute, and the decree of the lower court is affirmed."

A case directly in point as to whether the law requires Mosher to rely *alone* on the credit of IMI-Ward is *Peters v. Raven*, 159 Ill. App. 122. This is a very informative case. The facts were that the *plaintiff* entered into a contract to

deliver merchandise to one Grage. Thereafter Grage told the plaintiff to *seek payment* from the defendant *Raven,* and Raven told Peters (the plaintiff) that he would *pay* all bills *for goods delivered to Grage.* Peters continued to deliver goods to Grage and *charged the same to Grage.*

It appeared that Raven held a mortgage upon Grage's property. The trial court instructed the jury that it could find for the plaintiff only if the plaintiff "furnished and supplied goods, wares, merchandise and labor to said Grage, intending to hold Raven *alone* responsible * * *" and that if "* * * plaintiff did not rely *alone* upon the promise of Raven * * *" it must find for the defendant.

The case was *reversed* and *remanded* on the ground that the *instruction* to the jury was *erroneous.* The court stated the law of Illinois as follows:

> "In our opinion the instruction is clearly erroneous as applied to the facts shown by the evidence. If, by reason of holding a mortgage upon Grage's property of $4,000 or otherwise, Raven *was interested in the business and primarily to protect his own interest* promised to pay for any goods sold, delivered to, or repairs made for, Grage thereafter, *it was an original* undertaking and not merely a collateral promise to pay the debt of Grage, and *it would not be necessary* to its validity that Peters in selling the goods and making the repairs should have intended to hold Raven *alone* responsible for such goods and labor. *A PROMISE SO MADE BY RAVEN WOULD BE NONE THE LESS AN ORIGINAL UNDERTAKING BECAUSE GRAGE ALSO BECAME INDEBTED.*"

There are many cases holding that the obligation of a person to pay a debt which is also owed by another person in these circumstances, neither requires nor assumes the release of the other person, for example, in *Rothermel v. Bell and Zoller Coal Co.,* 79 Ill. App. 667, it was held that an oral promise by an individual to pay a company's debt

was valid, notwithstanding the company had been released by the creditor, for the reason that it was sufficient consideration for the promisor's undertaking and that the creditors could take advantage of his agreement made for their benefit but not releasing their claims against the original obligor.

Again, in *Holmes v. Suffrin*, 198 Ill. App. 45, it was held that "a valid oral promise may be made with regard to the debt of a third person without releasing the original debtor." Again, in *Lusk v. Throop*, Supreme Court Illinois, 59 N.E. 529, the taking of security from a sub-contractor did not relieve the contractor of a promise to pay for materials delivered to the sub-contractor. In *Lusk v. Throop*, the Supreme Court of Illinois held that there was nothing in the transaction which necessarily required that either obligor be released in order to bind the other obligor in these circumstances, stating that it was a question for the jury to determine whether the Plaintiff intended, by taking the notes and mortgages from the sub-contractor thereby to release the contractor. In our case the trial court has found no intent on Mosher's part to relieve the Joint Venture of its responsibility to Mosher under the Joint Venture purchase orders.

Virtually all of the cases following the "main purpose rule", cited in Appellee's response to the brief of Appellant Union, presuppose the continuing obligation of the original obligor even under circumstances where an oral promise in terms to answer for the debt of the original obligor has been held, because of the main purpose rule, to be direct, rather than collateral.

Thus all the cases support the basic proposition found in the *American Law Institute, Restatement of the Law of Contracts*, in which validity is confirmed for contractual situations in which two persons are separately obligated

to the same person for the same performance and one person is obligated to two separate persons for one performance. *(ALI Restatement of the Law of Contracts, Vol. 1, Sec. 111, Page 130, Sec. 113, Page 131 and Sec. 128, Page 146)*

RESPONSE TO POINT II

The Performance For The Joint Venture Under The Joint Venture Purchase Orders Was Not The Performance Which Mosher Was Already Legally Bound To Perform, Because At The Time Mosher Agreed And Performed Under The Joint Venture Purchase Orders, The Joint Venture And Union Had Requested That Performance Be Made Under Those Purchase Orders And These New Agreements Relieved Mosher Of Its Duties Under The Interim Purchase Order With Union (Pl. 1).

Under Point II, Ward cites numerous cases for what it describes as the "textbook learning" that a promise to perform that which one is already legally bound to perform cannot constitute a sufficient consideration for a subsequent promise.

In citing these cases as being applicable to the facts, Ward misreads and misinterprets not only the position of Mosher but the position of the Court in its Findings of Fact and Conclusions of Law. Mosher did not sue on, or obtain a judgment against Union in this proceeding on the basis of the oral contract made on October 13, 1961, or the Letter Agreement dated October 16, 1961, which constituted an interim purchase order for the Tucson work between Mosher and Union. The significance of the oral agreement and the interim purchase order of October 16, 1961 is simply that, at the time when the intervention of the Joint Venture, insofar as the Tucson was concerned, and the addition by the Joint Venture of the Vandenberg work, occurred, Mosher considered itself bound under the October 16 interim purchase order and had commenced performance thereunder, but as a result of the intervention of the Joint Venture

requesting that Mosher accept the Joint Venture Purchase Orders in lieu of the expected formal Graver purchase order, and the agreement of Union to pay Mosher for the performance prescribed by the Joint Venture Purchase Orders (Jt. 9 and 10), Mosher, Union, and the Joint Venture all agreed that no formal purchase order would be forthcoming from Union, and that Mosher would perform, instead, under the Joint Venture Purchase Orders with Union's agreement to be responsible for payment.

Thus, at the Joint Venture's own solicitation, a new contractual relationship was created with Union's consent, so that Mosher was necessarily relieved of its duties under the October 16 interim purchase order and became obligated under the Joint Venture Purchase Orders and the agreement with Page that if Mosher would so perform, Union would pay Mosher.

This being the case, the "textbook learning" cited by Ward, while hallowed, has nothing to do with the case.

Insofar as the contractual relationships upon which suit has been brought, and upon which judgment has been granted, are concerned, the acceptance by Mosher of the obligations embodied in the Joint Venture Purchase Orders was coincidental with the obligation between Union and Mosher for payment for Mosher's performance under those purchase orders.

RESPONSE TO POINT III

Mosher Did Not Extend Credit Or Deliver Goods To IMI, But To A Joint Venture Composed Of IMI And Ward.

In presenting recitations of the testimony and evidence in this brief, it has been shown, and the Court has found, that at all times Mosher dealt with the Joint Venture composed of IMI and Ward rather than with IMI individually, and that those who dealt with Mosher on behalf of the

Joint Venture acted for the Joint Venture rather than for IMI individually. The Trial Court has so found upon a preponderance of credible testimony and evidence. It would appear that these Findings by the Trial Court would have relieved Appellant Ward of the necessity of reciting the law relating to joint ventures as distinguished from partnerships, and the law relating to contracts with an individual partner where the contracting party elects to do so.

In its argument Ward quotes certain fragmentary parts of the Joint Venture Agreement, citing it to the record as Joint Exhibit 8. Appellee's list of Stipulated Exhibits indicates that it is Joint Exhibit 7.

For example, in quoting paragraph 2 of the Joint Venture Agreement, Ward states that the "IMI-Ward subcontracts will be entered into in the names of the parties hereto as joint venturers," but it fails to quote the immediately succeeding language that "and their obligations thereunder shall be joint and several and all money, equipment, material, supplies and other property of any nature whatsoever required for or in connection with the performance of the IMI-Ward subcontracts shall be held for the account of IMI-Ward, the Joint Venture."

Again under paragraph 7 of the Joint Venture Agreement, Ward neglects to recite "that the committee may assign the performance of certain minor portions of the work to Ward," and that "The work and services performed by either IMI or Ward shall be done on the basis of the assumption and reimbursement by the Joint Venture of the actual costs of such work, including overhead and general administrative expenses, but shall not include any provision for profit."

In paragraph 8 of the Joint Venture Agreement, the quotations regarding its financing refer, of course, to bank

loans necessary to the meeting of payrolls, etc. required by the Joint Venturers in performing that part of the work to be done in their own plants.

Finally, Ward quotes a statement in paragraph 9 of the Joint Venture Agreement to the effect that neither the committee nor either party shall have the power to borrow monies or pledge the credit of the other party to this agreement or on their joint credit, *except as herein provided.* Ward neglects to recite the matters which come under the heading "except as herein provided." The "except as herein provided" clause includes all matters relating to the performance of the Joint Venture subcontracts from Union, and in so doing, not only were all obligations joint and several, pursuant to paragraph 2, all money, material, etc. used therein held by the Joint Venture under paragraph 2, and all monies related thereto declared "to be trust funds." (paragraph 10.) But, of course, under paragraph 6 the work under the IMI-Ward subcontracts was to be managed by a Joint Venture Committee under the supervision of George J. Morton as Manager, with full authority to commit or bind the Joint Venture in commitments related to the normal performance of the Joint Venture contracts (paragraph 6).

Under the Joint Venture Agreement, it is immaterial whether, under the law of New York a joint venture is, or is not, the same as that governing partnerships, although under the record in this case and the Findings of Fact by the Trial Court, it is obvious that if the Joint Venture is in legal effect a partnership under the law of New York, the Joint Venture Partnership, if that it be, would clearly be bound.

In fact, it was not contemplated by, nor permitted by the Joint Venture Agreement, that either IMI or Ward, in the

performance of the work embodied in the contract with Union relating to Tucson and Vandenberg could act individually, since they had agreed that all of their obligations for the performance of the work would be joint and several, and all their money, materials and every other thing used in the prosecution of the work were "trust funds" dedicated to the work.

In the last few pages of its brief, Ward again disputes the facts as found by the Trial Court and again argues the importance of certain facts, and ignores others, all of which matters have been raised before and found against Ward by the Findings of Fact, and, like Union, in Union's brief, raises the spectre that the fact that Mosher obtained certain shares of stock in the arrangement confirmed in the IMI Chapter XI Reorganization, every penny of which has been credited to Ward in the judgment, nevertheless deprives Mosher of its claim against Ward.

In so doing Ward does not even quote a single passage from the Proof of Claim filed by Mosher in the IMI Chapter XI proceedings. The Court is respectfully referred to Appellee's argument with respect to the Chapter XI proceedings and Mosher's declarations and reservations against Ward as joint venturer with the Debtor. In its Proof of Claim, in the Stipulations with the Attorney for the Debtor, and in the Bankruptcy Judgment itself, the declaration and reservation even refers the Bankruptcy Court to the specific number of the suit in Arizona, which is the subject of this appeal. The final statement that the claims of the individual creditors of IMI were diminished by the distribution of stock made to Mosher in the Chapter XI proceedings is not substantiated by the record, and Ward makes no reference to the record in its gratuitous accusation.

CONCLUSION

Based upon the trial court's findings of fact which are amply supported by a preponderance of the evidence, and the rules of law applicable to those facts, as set forth in this brief, Appellee Mosher Steel Company respectfully prays that the Judgment entered on May 4, 1966 by the United States District Court for the District of Arizona, sitting at Tucson, Arizona be affirmed as to Appellant Ward Industries Co., Inc. (save for the denial of pre-judgment interest) and Appellee further prays that it be awarded its costs of suit.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Frank H. Watkins

Frank H. Watkins, *Attorney*